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DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-202625

DATE: December 31, 1981

MATTER OF: Major Russell G. Watts, USA, Retired
(Deceased)

- DIGEST:
1. An offset against the Survivor Benefit Plan annuity, computed solely on the military service of deceased spouse, is imposed when the annuitant reaches age 62. This offset may be reduced if the annuitant would have social security survivor benefits reduced because of work even though no claim has been made for social security benefits.
 2. Survivor Benefit Plan (SBP) annuity offsets, under 10 U.S.C. 1451 because of social security entitlement, are computed when the annuitant reaches age 62. This offset may be reduced if the annuitant's social security entitlement is reduced because of work. If the SBP offset is reduced or eliminated because of work and the annuitant discontinues working and becomes entitled to social security benefits the SBP offset is reinstated computed at age 62.

The Survivor Benefit Plan (SBP) annuity payable to survivors of military retirees is normally offset by social security benefits which could be paid to the annuitant based upon the retiree's military service. When the survivor reaches 62 years of age and has no dependent child the offset becomes effective even though the annuitant has not applied for social security benefits. An amendment to the pertinent provision of law (10 U.S.C. 1451) enacted in 1978 provides that offset will not be made to the extent that the social security benefit has been reduced on account of the annuitant's earnings for work performed. We are asked to determine whether this exception to offset against annuities may be predicated upon theoretical entitlements rather than an actual decrease in the annuitant's social security benefits on account of work performed. For the

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reason given below we find that this exception to the offset requirement may be based on a theoretical reduction of social security benefits even though the annuitant has not made a claim for social security benefits.

The questions together with a discussion were submitted by the Disbursing Officer, United States Army Finance and Accounting Center, and were assigned submission number DO-A-1360 by the Department of Defense Military Pay and Allowance Committee. The questions relate to the propriety of payment on a voucher in favor of Mrs. Nimi Watts, an SBP annuity recipient.

Major Russell G. Watts retired from the Army on August 1, 1960. On December 21, 1972, he elected to participate in the SBP to provide an annuity for his wife computed on his full retired pay. He died on January 17, 1973. At the time of his death, Mrs. Watts was 55 years of age and she was paid an annuity based on his election. When she became age 62, the Army reduced the amount of her annuity in accordance with 10 U.S.C. 1451(a) by an amount equal to that which she was entitled to receive from social security as a survivor of her husband based solely on his military service. Subsequently this offset from the annuity based on entitlement to social security was discontinued and refund made by the Army when they received a statement from the Social Security Administration to the effect that she would not have been entitled to benefits from social security even if she had applied because of the level of her income from her current work. The offset has now been reinstated and a series of questions submitted here as a result of amendments to 10 U.S.C. 1451(a) enacted in 1978.

Subsection 1451 of title 10, United States Code, prior to the 1978 amendment, provided in pertinent part as follows:

"(a) * * * When the widow or widower reaches age 62, or there is no longer a dependent child, whichever occurs later, the monthly annuity shall be reduced by an amount equal to the amount of the survivor benefit, if any, to which the widow

or widower would be entitled under subchapter II of chapter 7 of title 42 based solely upon service by the person concerned as described in section 410(1)(i) of title 42 and calculated assuming that the person concerned lived to age 65. For the purpose of the preceding sentence, a widow or widower shall be considered as entitled to a benefit under subchapter II of chapter 7 of title 42 even though that benefit has been offset by deductions under section 403 of title 42 on account of work."

We have consistently held that this language requires an offset against the SBP annuity of any social security survivor benefits for which a person is eligible. The offset is required even if the individual has not applied for the benefit but is merely eligible. 58 Comp. Gen. 795 (1979), and 57 Comp. Gen. 339 (1978). This offset was still applied even though an eligible survivor could not receive social security benefits because of earnings covered by the system.

On October 1, 1978, the provisions of section 204(b) of Public Law 95-397, approved September 30, 1978, 92 Stat. 843, 846, became effective, and amended the last sentence of 10 U.S.C. 1451(a) to read:

"For the purpose of the preceding sentence, a widow or widower shall not be considered as entitled to a benefit under subchapter II of chapter 7 of title 42 to the extent that such benefit has been offset by deductions under section 403 of title 42 on account of work." (Emphasis supplied.)

The legislative history of the provision does not provide any guidance as to whether the Congress in enacting this provision intended it to apply when a widow or widower was working but had not applied for social security benefits, or whether it intended that the provision apply only

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when the social security benefits had actually been reduced because of work.

The language of the law seems to indicate that an actual reduction in social security benefits must be in effect before the SBP annuity offset may be reduced and the SBP payments increased. However, this result is not in keeping with the way in which the social security offset is otherwise applied. No claim for social security benefits is needed before an SBP offset is required. The offset is predicated upon potential receipt of social security benefits. We do not find any indication that Congress intended to change the basis for SBP offsets when the 1978 amendment was enacted. Therefore, the reduction in SBP offset should be made when it is shown that the annuitant would have social security benefits reduced or eliminated because of earnings for work performed if social security were claimed.

Computations of potential social security benefits are made at the time the widow or widower reaches 62 years of age. Should an individual be entitled to a reduction or elimination of SBP offset because of employment under the provision of law in question, but between ages 62 and 65 terminates or curtails such employment and applies for social security, the SBP offset would be required based upon a theoretical continuing entitlement to social security benefits from age 62.

Accordingly, the voucher submitted is returned to the Disbursing Office for payment.

For the *Harry R. Van Cleave*
Comptroller General
of the United States